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IN THE

SUPREME COURT

OF THE

UNITED STATES

Number 412.

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

V.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

BRIEF ON BEHALF OF RESPONDENTS VAN E. PETERSON, RECEIVER, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA.

BENJAMIN F. BUTLER,
WALTER D. JAMES,
Counsel for Respondent Van E. Peterson, Receiver of the Union State Bank of Harvard, also Receiver of the Nebraska State Bank of Harvard.
EARL M. CLINE,
FRANK D. WILLIAMS,
Counsel for The First Trust Company of Lincoln, Nebraska.

WEHRBEIN-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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STATEMENT OF CASE.

Christian Knudson died in 1923, a resident of Hamilton County, Nebraska. He had never completed taking out

citizenship in this country and was an alien. His wife, the petitioner Marie Tollefsen Todok, from whom he had separated in Norway in 1868, was at all times and still is a non-resident alien, living in and a subject of the Kingdom of Norway. His son, the other petitioner, was born in Norway and came to Nebraska in 1893, and later permanently left the state of Nebraska. The foregoing facts appear in the statement of the case contained in the opinion of the Supreme Court of Nebraska (page 75, transcript of record).

There is no proof anywhere in the record and was none before the Supreme Court of Nebraska that the petitioner Knute C. Engen ever became a naturalized citizen of the United States. Being born an alien, and there being no proof in the record of his acquiring citizenship, the presumption applied by the Supreme Court of Nebraska as to his father remaining an alien would also apply to him, so that both of the petitioners in this suit are non-resident aliens of the state of Nebraska.

Prior to his death, Christian Knudson had in the year 1923 executed deeds to the property involved in this case to the respondents Browns and Megrues, the wives of Brown and Megrue being his nieces, and the consideration for the conveyance care and support rendered to him (pages 75-75, transcript of record). It was to set aside these deeds, and subsequent deeds and mortgages of the property in controversy, that petitioner herein Knute C. Engen instituted suit in the district court of Hamilton County, Nebraska, where the real estate in controversy was situated. Mari Tollefsen Todok, who was joined as a party defendant to the suit under the Nebraska practice, filed a cross-petition seeking the same relief.

The ground for attack upon the deeds in the district court in Nebraska was two-fold:

1. That the deeds were obtained from Christian Knudson by fraud and undue influence.

2. That the deeds covered property claimed to be the homestead of Christian Knudson and his wife, and were void because of the failure of the wife, living in Norway, to join in the execution of the deeds.

The district court in Nebraska found against the petitioners upon the first ground, but sustained their contention upon the second ground.

The Supreme Court of Nebraska, upon trial *de novo* upon appeal, as is required in suits in equity under the Nebraska practice, approved the finding of the trial court as to the first ground, stating in the opinion:

> "A careful consideration of the evidence contained in the record inclines us to the belief, consistent with the findings of the trial court who heard the evidence and observed the witnesses who testified in person before him, that there was no fraud, conspiracy or undue influence exercised by the defend ants, or their agents, on Christian Knudson concerning, or in connection with, the conveyances of the premises involved in this litigation to the defendants Browns and the defendants Megrues" (Transcript of Rec. p. 77).

The Supreme Court of Nebraska with respect to the second ground, the homestead question, reversed the judgment of the district court of Hamilton County and directed a dismissal of the suit. In doing so, the Supreme Court of Nebraska held that the treaty between Norway and the United States upon which it was necessary for petitioners to rely did not operate to clothe a non-resident

alien wife with any rights under the Nebraska homestead statute, so as to require her signature to a conveyance of real estate in Nebraska owned by her husband, a resident alien. The Supreme Court of Nebraska concerned itself solely with respect to a construction of the treaty and the rights of the parties thereunder, but it is necessary to take into consideration several Nebraska constitutional and statutory provisions that made it necessary for the petitioners to rely upon the treaty, in order to understand the part the treaty played in the decision of the case.

Nebraska Constitutional and Statutory Provisions Necessary To Understanding of Case.

Prior to the year 1920, the Constitution of Nebraska had provided:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."
>
> Section 25, Article 1, Constitution of Nebraska of 1875.

In 1920, prior to the conveyances involved in this controversy and prior to the death of Christian Knudson, the Constitution of Nebraska was amended as follows:

> "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property.
>
> "The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law."
>
> Section 25, Article 1, Constitution of Nebraska of 1920.

Prior to the amendment of the Constitution in the respect noted, a Nebraska statute, enacted originally in 1889, provided:

> "Non-resident aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the State of Nebraska; and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeiture of all such lands as provided by this article."
>
> Section 6273, Rev. Stat. Neb. 1913.

After the amendment of the Constitution in 1920, and prior to the conveyances involved in this controversy, the legislature of Nebraska in 1921 passed Chapter 142, Session Laws of Nebraska for 1921, which act was in full force and effect at the time of the conveyances in controversy and at the time of the death of Christian Knudson.

Section 1 of Chapter 142, Session Laws of Nebraska for 1921, now Sec. 5687, Comp. Stat. Neb. 1922, provides:

> "Aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land,

or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or Browns and the defendants Megrues" (Transcript of descent for a period of ten years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value such lands or other interest therein shall revert and escheat to the State of Nebraska; and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands or other interests therein as provided by this article. Any resident alien may acquire title to lands in this state by devise or descent only, provided such alien shall be required to sell and convey said real property within five years from the date of acquiring the same and if he shall fail to dispose of the same to a *bona fide* purchaser for value within said time, said land and property shall revert and escheat to the State of Nebraska * * *."

Section 2 of Chapter 142, Session Laws of Nebraska for 1921, now Sec. 5689, Comp. Stat. Neb. 1922, provides:

> *"Any alien who owned land in this state on the date of the passage and taking effect of this act may dispose of the same during his life to bona fide purchasers for value,* and may take security for the purchase money with the same rights as to securities as a citizen of the United States except as hereinafter limited by this article."

Section 1220, Comp. Stat. 1922, originally enacted in 1907, and in full force and effect at the time of the conveyances involved herein and at the death of the deceased, provides:

> "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased

was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, *or by the deceased while the husband or wife was a non-resident of this state,* which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following:

"*First.* One-fourth part to the husband or wife, if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children surviving.

"*Second.* One-third part to the husband or wife if the survivor is the parent of all the children of the deceased and there be two or more children, or one child and the issue of one or more deceased children surviving.

"*Third.* One-half to the husband or wife, if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child, surviving * * *."

Section 1224, Comp. Stat. 1922, originally enacted in 1907, provides:

"The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, *and, if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance;* and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title."

Section 2816, Comp. Stat. 1922, originally enacted in 1879, provides:

> "A homestead not exceeding in value two thousand dollars, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

Section 2819, Comp. Stat. 1922, originally enacted in 1879, provides:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Section 2832, Comp. Stat. 1922, originally enacted in 1879, provides:

> "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of same, except the life estate of the survivor, by will."

The Treaty Provision Involved in This Case.

Article VI of the Treaty between the United States of America and the Kingdom of Sweden, which then included Norway, ratified in 1783, and revived by Article XVII of the Treaty of 1827, provides:

> "The subjects of the contracting parties in the respective states, may freely dispose of their goods

and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction,'* on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States on their part, or any of them, shall be at liberty to make respecting this manner, such laws as they think proper."

Federal Questions Presented for Review.

The federal questions presented to this court for review may be summarized as follows:

I.

Does Article VI of the Treaty with Sweden of 1783, revived by the Treaty of 1827, include within its scope protection to a claim of homestead growing out of the marital relationship in favor of an alien wife residing in Norway so as to prevent a valid conveyance without her signature of Nebraska real estate by her husband, an alien resident of Nebraska?

II.

Does Article VI of the Treaty with Sweden of 1783, revived by the Treaty of 1827, prevent a valid conveyance of Nebraska real estate by a resident alien without the

signature of a non-resident alien wife, a right accorded to a citizen of Nebraska by interpretation of the homestead statute by the highest court of that state?

III.

Do the Due Process of Law and Equal Protection of the Law clauses of the Constitution of the United States protect a claim of homestead growing out of the marital relationship in favor of an alien wife residing in Norway so as to prevent a valid conveyance without her signature of Nebraska real estate by her husband, an alien resident of Nebraska?

Disposition of Federal Questions By Supreme Court of Nebraska.

The Supreme Court of Nebraska answered the treaty questions that are presented to this court in the negative, predicating its holding in an opinion written by Justice Eberly (Trans. of Rec. pp. 74-80) upon two separate and distinct grounds:

1. That the treaty did not protect the non-resident widow with reference to any claimed rights arising under the Nebraska homestead statute for the reason that the language of the treaty disclosed no intention on the part of the framers of the treaty to create or provide for a non-resident alien wife any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property, and also for the reason that homestead statutes were unknown at the time the treaty was entered into, and therefore necessarily not within the contemplation of the contracting nations.

2. That the requirement of the Nebraska homestead law that a wife join in a conveyance thereof by her husband,

if otherwise applicable, was in violation of the terms of the treaty, which gave to the subjects of the contracting parties the right to freely dispose of their goods and effects by testament, donation or otherwise.

The constitutional question presented to this court for review was not mentioned or discussed in the opinion of the Nebraska Supreme Court, if it was ever presented for consideration.

PROPOSITIONS OF LAW RELIED UPON BY RESPONDENT.

I.

In the absence of treaty to the contrary, a state has power to deny to aliens the right to own land within its borders, or to hold any lesser interest or right therein.

Webb v. *O'Brien*, 263 U. S. 112, 44 Sup. Ct. Rep. 112.

Terrace v. *Thompson*, 263 U. S. 196, 44 Sup. Ct. Rep. 15.

Hauenstein v. *Lynham*, 100 U. S. 483.

Chirac v. *Chirac*, 2 Wheat. 259, 4 U. S. (L. Ed.) 234.

Beard v. *Rowan*, 9 Pet. 301, 9 U. S. (L. Ed.) 135.

Wunderle v. *Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Dougherty v. *Kubat*, 67 Neb. 269, 93 N. W. 317.

II.

Since the treaty-making power is independent of and superior to the legislative power of the states, meaning of treaty provisions is not restricted by any necessity of avoiding possible conflict with state legislation, and, when

so ascertained, must prevail over inconsistent state enactments.

Nielsen v. *Johnson,* 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Ware v. *Hylton,* 3 Dall. 199, 1 L. Ed. 568.

III.

When a treaty provision fairly admits of two constructions, one restricting and one enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.

Nielsen v. *Johnson,* 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Jordan v. *Tashiro,* 278 U. S. 123, 49 Sup. Ct. Rep. 47.

Geofroy v. *Riggs,* 133 U. S. 285, 10 Sup. Ct. Rep. 295.

Goos v. *Brooks,* 117 Neb. —, 223 N. W. 13.

IV.

In construing treaties, it is proper to consider the circumstances existing at the time the treaty was ratified to determine what was within the contemplation of the contracting parties.

Ross v. *McIntyre,* 140 U. S. 453, 11 Sup. Ct. Rep. 879.

Liberato v. *Royer,* 270 U. S. 535, 46 Sup. Ct. Rep. 373.

Strother v. *Lucas,* 12 Peters 410, 9 L. Ed. 1137.

Mott v. *Cline,* (Cal) 253 Pac. 718.

V.

Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.

Sullivan v. *Kidd*, 244 U. S. 433, 41 Sup. Ct. Rep. 158.

26 R. C. L., page 926.

VI.

In interpretation of contracts, it is an elementary principle that the court will place itself in the position of the parties under the circumstances existing at the time the contract was made to ascertain what was within the contemplation of the contracting parties. The surrounding circumstances must be considered as of the time the contract is made and not in the light of subsequent events.

Mobile etc. Ry. Co. v. *Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

Reed v. *Merchants' Mut. Ins. Co.*, 95 U. S. 23, 24 L. Ed. 348.

Fiscus v. *Wilson*, 74 Neb. 444, 104 N. W. 856.

Nebraska Hardware Co. v. *Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

13 Corpus Juris, page 542.

6 Ruling Case Law, page 849.

VII.

Treaty provisions are sufficiently complied with by according to the alien in this country all of the rights of a citizen, without going further and extending rights to a non-resident alien wife similar to the rights of a resident wife.

Mariorano v. *Baltimore R. R. Co.*, 213 U. S. 268, 29 Sup. Ct. 424.

VIII.

Homestead laws are of American origin, and were developed in this country long after the treaty with Sweden of 1783 was ratified.

29 Corpus Juris, Homestead, page 782.

13 Ruling Case Law, Homestead, par. 2, pages 540-541.

Barney v. *Leeds,* 51 N. H. 253.

IX.

The purpose and intent of homestead laws was to protect actual homes, and not to give any benefits to a non-resident alien wife in real estate.

Tromsdahl v. *Nass,* 27 N. D. 441, 146 N. W. 719.

Stanton v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395.

Dickman v. *Birkhauser,* 16 Neb. 686, 21 N. W. 396.

Cunningham v. *Marshall,* 94 Neb. 302, 143 N. W. 197.

X.

Rights growing out of the marital relationship, such as dower and homestead, are not privileges or immunities of citizenship, either state or federal within the meaning of Article 4, Section 2, of the Constitution of the United States, nor is the power of the states to regulate same denied by the Fourteenth Amendment to the Constitution.

Ferry v. *Spokane, P. & N. Ry. Co.,* 258 U. S. 314, 42 Sup. Ct. Rep. 358.

Randall v. *Krieger,* 23 Wallace 137, 23 L. Ed. 124.

Miner v. *Morgan,* 83 Neb. 400, 119 N. W. 781.

Buffington v. *Grosvenor,* 26 Kan. 730, 27 Pac. 137, 13 L. R. A. 282.

Rieger v. *Harrington,* 102 Ore. 603, 203 Pac. 576.

Thornburn v. *Doscher,* 32 Fed. 812.

XII.

Michigan, Kansas, Wisconsin and Nebraska all have statutes permitting one spouse to convey real estate alone where the other spouse is a non-resident of the state. All of these states also have homestead statutes. Construing the statutes together, these states have uniformly held that where the wife is a non-resident, a conveyance by the husband alone of property falling within the statutory definition of the husband's homestead is valid. The purpose of permitting one spouse to convey without the signature of a non-resident wife is to insure land titles against the claims of absent and probably unknown wives. The Supreme Court of the United States has pointed out the uniformity of statutory construction maintained by the states of Michigan, Kansas, Wisconsin and Nebraska, with reference to conveyance by husband alone where the wife is a non-resident, and has upheld the constitutionality of such statutes.

Ferry v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 314, 42 Sup. R. 358.

Miner v. *Morgan,* 83 Neb. 400, 119 N. W. 781.

Cunningham v. *Marshall,* 94 Neb. 302, 143 N. W. 197.

Ligare v. *Semple,* 32 Mich. 438.

Stanton v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395.

Buffington v. *Grosvenor,* 46 Kan. 730, 27 Pac. 137.

Jenkins v. *Henry,* 52 Kan. 608, 35 Pac. 216.

Bennett v. *Harms,* 51 Wis. 251, 8 N. W. 222.

Ekegren v. *Marcotte,* 159 Wis. 530, 150 N. W. 969.

XI.

A decision of the highest court of a state fixes the meaning of state legislation, as though such meaning had been specifically expressed therein.

Knights of Pythias v. *Meyers*, 185 U. S. 31, 68 L. Ed. 891.

ARGUMENT.

I.

The treaty between Norway and the United States did not protect any claim or privilege of homestead growing out of the marital relationship to the non-resident wife so as to prevent her husband, an alien resident of Nebraska, from validly conveying real estate owned by him without his wife's signature to the conveyance.

It has been the fixed legislative policy of Nebraska to deny to non-resident wives any inchoate interest or expectancy in the real estate of her husband. The underlying basis for this legislative policy is stated by this court in *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314, 42 Sup. Ct. Rep. 358, where, after pointing out the similar legislative policy of the states of Oregon, Michigan, Wisconsin, Kansas and Nebraska, and the construction placed thereon by the courts of those states, it is said:

> "The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives."

While the court in the above case was dealing with the principle of dower, the same rule is applicable to homestead exemption. Both are created by statute and the inchoate interest of the wife during the lifetime of the

husband as to each arises by virtue of the marital relationship.

Under the Nebraska statutes hereinbefore quoted, a conveyance by the husband alone where the wife is a non-resident operates to bar the wife's right of inheritance, which under the Nebraska law was substituted in 1907 in lieu of dower. Prior to 1907, when dower existed, it was cut off by transfer of the husband alone, when the wife was a non-resident.

Comp. Stat. 1903, C. 23, Sec. 20.

Miner v. *Morgan*, 83 Neb. 400, 119 N. W. 781.

It is also a fixed legislative policy of Nebraska to deny to non-resident aliens the right to acquire or hold any interest in Nebraska real estate.

Under the Constitution of 1875, prior to its amendment in 1920, the legislature of Nebraska was prohibited from making any distinction between resident aliens and citizens with reference to the possession, enjoyment or descent of real estate. Article 1, Section 25, Nebraska Constitution of 1875, hereinbefore set out in full. This constitutional provision, however, did not prevent legislation with reference to non-resident aliens. In 1889, Nebraska passed a statute prohibiting non-resident aliens from acquiring title to or taking or holding any lands or real estate by descent, devise, purchase or otherwise, except that the widows and heirs of aliens who had prior to March 16, 1889, acquired lands in the state under the laws thereof might hold same for a period of ten years and no longer. This statute was held constitutional in *Dougherty* v. *Kubat*, 67 Neb. 269, 93 N. W. 317.

Under the Nebraska Constitution, as amended in 1929, the legislature was given power to regulate by law the acquisition, enjoyment and descent of property of aliens. Sec. 25, Article 1, of the Nebraska Constitution of 1920, hereinbefore set out.

Under a statute passed in 1921, pursuant to the constitutional amendment of 1920, all aliens, whether resident or non-resident, were prohibited from acquiring or holding any land, or real estate, or any leasehold interest therein extending for a period for more than five years or any other greater interest less than fee in any land, only as provided in the act. There is no provision in the act permitting an alien to hold a homestead interest in land. Aliens who owned land in the state on the date of the passage of the act are permitted to dispose of the same during their lifetime. Widows and heirs of aliens who had prior to March 16, 1889, acquired lands in the state are permitted to hold such lands for a period of ten years and no longer. See provisions of Chapter 142, Session Laws of Nebraska for 1921, hereinbefore set out.

With the foregoing constitutional and statutory provisions in mind, let us examine the Nebraska homestead act. It was enacted in 1879. Its purpose was to protect an actual home to the claimant of homestead residing thereon. To effectuate this purpose, and to protect the wife in the enjoyment of the home, a life estate in the homestead proprty vested in the wife upon the dath of the husband, of which he could not deprive her by will. Her signature was required to a deed of the homestead property. In other words, it was an inchoate interest or expectancy in his real estate which ripened on his death into a life estate.

The alien law, enacted ten years later in 1889, is absolutely inconsistent with and repugnant to the homestead act, if the homestead act be construed to give such inchoate life estate to a non-resident alien wife. Under the alien law, if the property was acquired by her husband prior to March 16, 1889, she could hold same for a period of ten years and no longer. If the property was acquired by her husband subsequent to March 16, 1889, the non-resident alien wife under the alien law could not acquire or hold the real estate at all. A prohibition to hold land at all, or even for ten years, is inconsistent with a life estate under the homestead act. If the homestead act did operate to give a non-resident alien wife an inchoate life estate in the property of her husband, a construction contrary to the spirit and intent of the act, the later alien statute operated as a repeal to the extent of the repugnancy, so as to preclude any homestead interest or expectancy in a non-resident alien wife, unless such right of homestead was saved to her by virtue of some applicable treaty.

Moreover, under the 1921 alien law passed pursuant to the constitutional amendment of 1920, it would seem that the benefit of homestead exemption in the land was taken away from all aliens, whether resident or non-resident. Counsel in their brief in this court (pp. 25-25) say that the Nebraska Supreme Court has held that the homestead exemption obtains in Nebraska, whether the occupant of the homestead was an alien or a citizen. In support of this statement, *People* v. *McClay*, 2 Neb. 9, is cited. An examination of that case discloses that it did not involve the homestead exemption at all, but an exemption of $500.00 in money to heads of family out of proceeds of sale of personal property on execution. Moreover, the case arose under the Constitution of 1875.

The Nebraska Constitution of 1875 was specifically amended in 1920 to give the legislature the power to regulate the acquisition, enjoyment and descent of property of all aliens, whether resident or non-resident. The benefit of homestead exemption is a statutory benefit which the state can give or withhold as it pleases. Pursuant to this constitutional amendment, the Nebraska legislature of 1921 passed an act with reference to aliens which is wholly inconsistent and repugnant to the existence of homestead exemption in an alien, and operated to take away from aliens any benefits under the homestead statute, unless such benefits were saved to aliens by virtue of some applicable treaty.

To obviate the purport and effect of the alien statute, the petitioners advance and rely upon the treaty between Norway and the United States as removing the disabilities of alienage and placing Knudson and his wife, Marie Tollefsen Todok, upon the same plane and standing as citizens of the United States. Their position is succinctly stated on page 25 of their brief in the following language:

> "The treaty removed the disabilities of alienage and placed Knudson on an equal footing with other homestead owners in Nebraska."

While counsel for petitioners constantly stress and refer to the homestead right of Knudson, it is not any right of his that they are seeking to enforce. Knudson exercised his right under the 1921 alien law to dispose of his land in his lifetime. He deeded the lands to those people who in his old age had rendered him care, comfort and support. Petitioners cannot point to anything that Knudson was prevented from doing by the construction placed upon the treaty by the Nebraska Supreme Court.

Their claim is based upon something that the Supreme Court of Nebraska permitted him to do under the treaty, which they say he should not have been permitted to do because his wife did not join.

It is the rights, if any, of the wife to the protection of the treaty that must be decided by this court. It was from this standpoint that the Supreme Court of Nebraska approached the decision of the case.

In stating the question presented for determination by it, the Nebraska Supreme Court (page 77, transcript of record) said:

> "We have before us for determination, therefore, the question of rights wholly derived from a subject of Norway, and who was an alien both at the time of the execution of the conveyances questioned and at the time of his death."

After quoting the language of the treaty, the Nebraska Supreme Court in its opinion (page 78, transcript of record) says:

> "To what extent, if any, is the claim of homestead in the property in controversy made on behalf of Mari Tollefsen Todok sustained and supported by the words quoted. These treaty provisions, referred to, date from 1783."

This was the crucial point in the case, and the point upon which the decision of the Nebraska Supreme Court rests. If Mari Tollefsen Todok does not have any claim of homestead in the property sustained and supported by the treaty, then no federal jurisdiction exists in this court upon which to reverse the judgment of the highest court in Nebraska.

A.

First Ground For Decision.

The first reason of the two assigned by the Nebraska Supreme Court in its opinion for denying that the treaty protected any homestead claim of the widow in Norway is contained in the following language in the opinion:

> "Homestead laws are strictly of American origin. The earliest statute of this kind was that enacted by the Republic of Texas, January 26, 1839. The first constitutional guaranty of homestead exemption was that of the Constitution of Texas in 1845. This was followed in turn by Vermont in 1849. All other states of the American Union adopted this policy at a date subsequent to 1849. In view of the history of the development and adoption of this public policy, it can hardly be inferred that the question of homestead rights were in contemplation of the makers of the treaty of 1783. True, the thirteen American states which then formed the Confederacy had each substantially adopted, for the benefit of the wife, the English doctrine of dower as defined at common law. Even so, it is, and was, an established doctrine of common law that 'dower rights are cast upon the widow by operation of law, and it is a well-settled common-law rule that an alien cannot cast any dower rights upon his wife, nor can an alien widow of a citizen take by dower any interest in her husband's lands.' 2 C. J. 1066, Sec. 32.
>
> "An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law dower to the wife of the alien; in fact, no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property" (Transcript of Rec. p. 78).

We submit that the first reason assigned by the Supreme Court of Nebraska in the foregoing language is ample and sufficient to sustain its judgment without regard to the second reason assigned of conflict between the terms of the treaty and the Nebraska homestead statute. Granting as true for the sake of argument that there is no conflict as petitioners contend, if the terms of the treaty disclose no intention to create or provide for the benefit of a non-resident alien wife special privileges or rights growing out of the marital relationship, then petitioners have not been deprived of any right under the treaty.

We submit that the first reason advanced by the Nebraska Supreme Court to sustain its conclusion is clearly right. How could the framers of the treaty intend to protect a privilege that was wholly unknown and unheard of at the time the treaty was framed? The terms of the treaty itself: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation or otherwise in favor of such persons as they think proper; and their heirs in whatever place they shall reside shall receive the succession even *ab intestato* either in person or by their attorney without having to take out letters of administration," certainly do not make any reference to or provision for any special privileges to a wife growing out of the marital relationship.

Counsel for petitioners in their brief have not attempted to meet the clear and logical reasoning of Judge Eberly that the benefit of homestead exemption, a thing unknown and unheard of at the time the treaty was contracted, could not have been intended by the contracting parties to be included within the scope of the treaty. Counsel confine their brief solely to the matter of conflict between the treaty and the statute.

The proposition is so simple and elemental that a treaty is to be construed in the light of the circumstances existing at the time it is entered into that apparently there is not a great abundance of authority upon the proposition.

In *Mott* v. *Cline,* (Cal.) 253 Pac. 718, the Supreme Court of California applied the same principle that the Nebraska Supreme Court did in this case. It was there held:

> "Treaties must be construed with respect to situation existing at time of ratification, difficulties sought to be corrected as shown by treaty, and modifications agreed on in supplemental treaties."

The Supreme Court of California in the Mott case, supra, had under consideration the California alien land laws. The applicability of those laws to subjects of China were challenged as being in contravention of the treaty with China. The treaty in general accorded to Chinese subjects, as classified in the act, the rights, privileges, immunities and exemptions which were accorded to "the citizens and subjects of the most favored nation." It is said in the opinion:

> "At the time the treaty of 1881 was adopted, they were not generally engaged in agricultural pursuits, and were no landholders, but mainly contract laborers, who had been brought into this country originally by the builders of the great transcontinental railroads to be used as laborers in the construction of said railroads. They settled in districts which became greatly overpopulated, and later engaged in the laundry business or mercantile pursuits. It was not until later that they became engaged in the vegetable and garden truck business, or

had any contact with the soil as producers of their ownership of or dominion over the agricultural lands of the state until a much later period. The proclamation and preamble of the treaty very clearly shows that it was meant purely as a purely immigration and labor treaty, *and it must be construed with respect to the situation that existed at the time it was ratified* and the difficulties sought to be corrected as shown by the treaty itself and by modifications that were agreed upon in supplemental treaties."

If it is permissible in construing treaties to take into consideration that at the time the treaty was entered into, Chinese were not generally engaged in this country in agricultural pursuits, and therefore ownership of agricultural lands was not within the purview of the treaty, it surely ought to be permissible for the Nebraska Supreme Court to take into consideration that the benefit of homestead exemption, a thing then wholly unknown and wholly unheard of, was not within the contemplation of the makers of the treaty.

This court, we believe, applied the same principle of construing a treaty in the light of circumstances existing at the time of ratification in *Liberato* v. *Royer,* 270 U. S. 535, 46 Sup. Ct. Rep. 373. In that case, this court held that a provision of the Pennsylvania Workman's Compensation act, providing that non-resident alien parents should not be entitled to any compensation, was not in conflict with the treaty with Italy of 1871, as amended in 1913, which amendment guaranteed to citizens of each country right of recovery for injuries or death caused by negligence or fault allowed by that country to its own nationals. It is pointed out in the opinion that the concept of liability without fault underlying workman's compensation laws was at the time the amendment to the treaty

was ratified exceptional and not usually imposed except as the result of voluntary arrangement. It is said in the opinion:

> "This amendment was suggested by the decision in *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 29 Sup. Ct. 424, 213 U. S. 268, 53 L. Ed. 792, that under the laws of Pennsylvania a non-resident alien widow could not recover for the death of her husband caused by the defendant's negligence, although citizens of the state were given a remedy. Following this suggestion, the words of the amendment, if taken literally, deal only with death caused by negligence or fault. It is natural that they should be limited in that way. Apart from those states, of which Pennsylvania is not one, that very recently have substituted for the common law a general system of quasi insurance, liability without fault is exceptional and usually has not been imposed for death except as the result of voluntary arrangement."

Applying the language of the foregoing opinion to the case at bar, the words of the treaty with Sweden, involved in this case, if taken literally, apply only to the right of the alien to receive property by inheritance, and is limited to that, and does not include a super-added benefit of homestead. The benefit of homestead exemption is not within the purview of the treaty because homestead laws were not known at the time the treaty was ratified. Like workman's compensation laws under the Italian treaty involved in the Liberato case, homestead laws were not within the contemplation of the treaty involved in this case.

In *Ross* v. *McIntyre*, 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35 L. Ed. 581, it is said in an opinion by Judge Field:

"It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances."

The same rule was applied in *Strother* v. *Lucas,* 12 Peters 410, 9 L. Ed. 1137.

The language of the treaty, as is pointed out in the opinion of the Nebraska Supreme Court, fails to disclose any purpose to create or provide any special rights or privileges whatever because of or based upon a marital relation sustained to an alien owner of property. As we read the treaty, the only rights given to others than the owners of the property do not arise until the time of his death. The treaty so far as the heirs of an alien are concerned deal only with property owned by him at the time of his death. The treaty does not purport to protect any inchoate interest in his property during his lifetime to his wife, so as to require her signature to a conveyance thereof.

There is another cogent reason why the framers of the treaty could not have intended to protect a claim of homestead to a non-resident alien wife and that reason arises out of the purpose and spirit of homestead laws. The intent of a homestead act is to keep the family together, not living separate and apart. The benefit a homestead act was intended to afford was protection of the family home, not creation of property rights in a non-resident wife.

The language of the Supreme Court of North Dakota in *Tromsdahl* v. *Nass,* (N. D.) 146 N. W. 719, where a non-resident wife residing in Sweden contended that a mortgage executed by her husband in North Dakota was

void because it covered his homestead and was not signed by her, is applicable:

> "It is doubtful if there is any valid reason why a married man in plaintiff's situation, who may never bring his family to this country (not having done so for six years since his arrival, and he being here, as the proof discloses, because he can secure more wages than in Sweden, and who elects to remain an alien, not giving this country even citizenship in return for its gold), should enjoy a homestead privilege as the resident head of a resident North Dakota family, an exemption privilege, or right denied to even the native and resident single men and women under ordinary circumstances. * * * Homestead provisions should be construed with reasonable liberality to effect their purposes, but it is a joke to contend that the framers of the homestead statutes ever contemplated that they should be invoked under such circumstances as these. * * * The homestead exemption in this state is primarily for the protection of the family residing in this state and upon the homestead tract; the presumption being that, if the family is residing elsewhere, the state of its actual residence will look after its own, and the same should be equally true as to aliens in a foreign country."

The language of the Michigan Supreme Court in *Stanton* v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395, 8 Am. St. Rep. 821, in denying homestead to a non-resident wife, is also applicable:

> "Under our laws the sale by a husband whose wife is a non-resident carries the property free from any right of dower. Actual non-residence in such case, in spite of the marital relation cuts off any control over the sale of a complete title. There is as much reason for the confinement of the homestead law. * * * The law would be grossly tyrannical if it tied the husband's hands in the one case at least, and

it cannot be possible that such consequences could have been designed by the constitution. It was designed to protect those who had subjected themselves to its laws, and acted in reliance on them, but not to treat as homes what are not homes, or give powers to non-residents which could not, under any circumstances, be of any use to them personally."

And finally, the language of the Nebraska Supreme Court, construing the Nebraska homestead act in *Dickman v. Birkhauser*, 16 Neb. 686, 21 N. W. 396, is extremely applicable:

"A homestead, in law, means a home place, or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom. L. Washb. Real Prop. (4th Ed.) 345. In other words, it is the actual home or domicile of the party. There is no claim that the defendant's home was at the residence of her husband at the time of his death."

We submit, that in view of the purpose, spirit and intent of homestead laws, the framers of the treaty could not have contemplated protection of an inchoate interest arising by virtue of such statutes in a non-resident alien wife living separate and apart from her husband.

Counsel for petitioners have quoted in their supplemental brief (p. 5) from *Mariorano* v. *Baltimore R. R. Co.*, 213 U. S. 268, 39 Sup. Ct. Rep. 424, and we think the question made alone would cause an affirmance of the judgment of the Nebraska Supreme Court. In the Mariorano case, this court held that the Italian treaty of 1871 did not protect to a non-resident alien wife a right of action for wrongful death of her husband, an Italian subject, living in Pennsylvania. The treaty by its terms

gave to citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of property. The quotation made by counsel for petitioners in their supplemental brief, and which we think is very pertinent in this case is as follows:

> "If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

The treaty with Italy was complied with by giving to the husband the same right accorded to citizens of this country, without extending rights to a non-resident alien wife. So, in this case, the treaty with Sweden is complied with by giving to the husband the right to freely dispose of his property, without extending to a non-resident alien wife an interest in the property so as to prevent a conveyance by him without her signature.

There is no broad and sweeping language in the treaty here under consideration giving to the subjects of the contracting parties all the privileges and immunities of citizens of the most favored nation. The treaty merely accords the right to an alien to dispose of his goods and effects freely by testament, donation or otherwise, and to his heirs to receive the property by succession exempted from all duty called "*droit de detraction.*" The Supreme Court of Nebraska denied none of these rights to

Christian Knudson or the petitioners. It permitted the deeds of Christian Knudson to stand. The treaty did not protect any special privilege or benefit to a non-resident wife because of the marital relationship. We submit that this language of the Supreme Court of Nebraska is ample to sustain its judgment and is decisive of the case:

> "An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law dower to the wife of the alien; in fact, no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property" (Transcript of Rec. p. 79).

B.

Second Ground For Decision.

With reference to the second ground for the decision of the Nebraska Supreme Court, namely, the conflict between the terms of the homestead statute and the treaty, it is not necessary to extend the discussion in this brief by dwelling at any considerable length thereon, as the first ground for the decision is ample to sustain the judgment. However, we submit that the opinion of the Nebraska Supreme Court is in accord with the literal language of the treaty, and is in accord with the general principle of treaty construction that a treaty should be liberally construed in favor of the rights to be exercised under the treaty. According to the language of the treaty, subjects of the contracting parties were given the right to freely dispose of their goods and effects to such persons as they see fit. When confronted with a statutory provision which in practical effect would impose a serious restrain on the exercise by an alien of his right to dispose of real estate, the Nebraska Supreme

Court decided against the statute and in favor of the treaty. It would be a real restraint upon alienation of the property to require a non-resident wife living in a foreign country to join in conveyance of real estate of an alien living in Nebraska. The case at bar is a very good example. How could Christian Knudson be said to have the right to "freely" dispose of his goods and effects, if it was necessary for him to secure the consent and signature to the conveyance of his wife living in Norway from whom he had been separated for over fifty years? When a man and wife are living together, it is not usually difficult to have both join in the conveyance, and it is not usually difficult for purchasers to determine who should sign the conveyance. But to require the signature of a non-resident and probably unknown wife would not only hamper the execution of the conveyance but would deprive the alien of purchasers for his land, who would not care to buy lands of aliens where there was always a possibility of an absent and unknown wife. If the state could hamper his right to dispose of his property by requiring the consent of a non-resident wife, it could hamper his right to dispose of his property by other restrictions.

Counsel for petitioners complain bitterly because they say that the decision of the Nebraska Supreme Court gives the alien greater rights than Nebraska citizens. As a matter of fact, it operates to place them upon exactly the same basis. An alien in Nebraska with a resident wife could not validly execute a deed that would deprive his wife of her marital interest in the property without her joining in the conveyance. Sec. 1224, Comp. Stat. 1922. On the other hand, a citizen of Nebraska who has a non-resident wife has the right to convey the homestead by his deed alone.

Cunningham v. *Marshall*, 94 Neb. 302.
Dickman v. *Birkhauser*, 16 Neb. 686.

Petitioner contends for a decision that Knudson, a Norwegian subject, could not make a valid deed without the joinder of his wife, who at all times was a resident of Norway and from whom he had been separated for 50 years. Such a decision would deny to Knudson right given him by the treaty to freely dispose of his property, even if it be considered that the treaty gave him no greater rights than a citizen.

The Supreme Court of Nebraska had definitely held that a citizen of Nebraska could convey land on which he resided with a minor son without the consent of his wife, who at all times had been a resident of New York. *Cunningham* v. *Marshall*, 94 Neb. 302:

> "This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster County. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.
>
> "Felix Cunningham, a married man, held the legal title to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value, the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within

> the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity."

This decision fixes the meaning of the homestead statute as if such meaning had been specifically expressed therein.

Knights of Pythias v. *Meyers*, 265 U. S. 31, 68 L. Ed. 891.

Petitioners seek to distinguish the case by merely referring to that part of the opinion in which the court said:

> "Neither the father nor his eldest son ever acquired, occupied or claimed, when in possession, a homestead in the land within the meaning of the homestead law."

It was, of course, unnecessary in Nebraska that any declaration or claim of homestead be filed in any court or public office or otherwise. Why, then, did not the court find that the grantor never acquired, occupied or claimed a homestead? The reason is plain. The homestead law was enacted for the protection of the family and where the wife had never been in the state and refused to come, as in this case, the spirit of the law could not apply. Not even the fact of residence on the land with a minor son was considered within the spirit or purpose of the homestead law.

There is nothing in this case to distinguish it from *Cunningham* v. *Marshall*. Points of difference are on the contrary against the claim of petitioner. In this case, the husband alone lived on the land. There were no minor children. The wife, never a resident of the

United States, had been separated from her husband for 54 years and had constantly refused to come to America.

The court did not dwell upon the reasons for its conclusion, but if they had been given, they would probably have been along the lines declared by the Supreme Court of North Dakota in *Tromsdahl* v. *Nass*, 146 N. W. 719, and *Buffington* v. *Grosvenor*, 46 Kan. 730.

The conclusion reached by the Supreme Court of Nebraska in the present case is the only conclusion proper under the existing laws and decisions of Nebraska. At the time Knudson made the deeds, it was established law in Nebraska.

1. That under Section 1224, Compiled Statutes of Nebr. 1922, the signature of a non-resident spouse was unnecessary.

2. That the signature of a non-resident spouse was unnecessary, even though the husband was occupying the land, together with a minor son, if the wife had never lived in Nebraska.

Cunningham v. *Marshall*, 94 Neb. 302.

3. The court was required to apply the treaty in the light of existing laws and decisions and could not deny to Knudson, a Norwegian subject, the same right to freely dispose of his lands which a Nebraska citizen would have had under like circumstances.

In other words, under *Cunningham* v. *Marshall*, had Knudson completed his naturalization and become a Nebraska citizen, the court would have held that the conveyance without the signature of his wife, a resident of Norway, would have been valid. To hold that the deed was not valid because Knudson had not completed his

naturalization, but remained a Norwegian subject would have denied to him the right to freely dispose of his property, guaranteed by the treaty.

Counsel for petitioners strenuously argue that the treaty should be so construed to avoid conflict with the Nebraska statute, and urge this as a rule of interpretation of treaties. Counsel in a supplemental brief cite numerous cases to the effect that an act of congress and a treaty should be construed so that both can stand and be given effect, if possible. Counsel then says:

> "While these quotations are from decisions construing federal statutes and treaties there seems to be no reason why the same ruling should not apply to a construction of a state's statute in conjunction with a treaty."
>
> (Petitioner's supplemental brief, p. 7.)

There is a very good reason why the same rule is not applicable to a state statute that is applicable to an act of congress. A federal statute is co-ordinate in rank with a treaty; a state statute is inferior and subordinate to a treaty.

This court in a very late case completely shatters the argument of counsel in the holding in *Nielsen* v. *Johnson*, 279 U. S. 47, 49 Sup. Ct. Rep. 223, where it is held:

> "Since the treaty-making power is independent of and superior to the legislative power of the states, meaning of treaty provisions liberally construed is not restricted by any necessity of avoiding possible conflict with state legislation, and, when so ascertained, must prevail over inconsistent state enactments."

We submit that the requirement that a non-resident alien wife consent to and join in a conveyance of real estate

is a substantial and material restraint upon the right of an alien to freely dispose of his goods and effects, and that the Supreme Court of Nebraska in upholding the deeds of Christian Knudson merely followed the general rule of treaty construction that where a treaty provision fairly admits of two constructions, one restricting and one enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.

Nielsen v. *Johnson*, 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Jordan v. *Tashiro*, 278 U. S. 123, 49 Sup. Ct. Rep. 47.

Asakura v. *Seattle*, 265 U. S.232, 44 Sup. Ct. Rep. 515.

Tucker v. *Alexandroff*, 183 U. S. 424, 44 Sup. Ct. Rep. 195.

In Re Ross, 140 U. S. 453, 11 Sup. Ct. Rep. 897.

Geofroy v. *Riggs*, 133 U. S. 258, 10 Sup. Ct. Rep. 295.

It is hard to see how petitioners are in any position to complain of the ruling of the Nebraska Supreme Court. The rights which they are accorded under the treaty do not arise until the death of the alien owning property. Their rights are to receive the property the alien owned at the time of his death by succession even *ab intestato* without having occasion to take out letters of naturalization, and exempted from all duty called *"droit de detraction."* The provision with reference to freely disposing of his goods and effects applies only to the alien owning the property and not to his heirs. The decision of the Nebraska Supreme Court was in favor of the treaty and against the statute. No rights which petitioners had under the treaty were prejudiced by the rul-

ing of the Nebraska Supreme Court, and in the absence thereof, they are not in a position to complain of its ruling.

II.

The due process of law and equal protection of the law's clauses of the Federal Constitution do not protect any claim or privilege of homestead growing out of the marital relationship to a non-resident alien wife.

Counsel for petitioners in their brief contend that the construction of the treaty by the Supreme Court of Nebraska violates the Fifth Amendment to the Constitution of the United States (pp. 28, original brief, pp. 14, supplemental brief). It has been decided time and again by this court that the first ten amendments to the Constitution of the United States apply only to the procedure in federal courts and do not apply to state courts.

Ensign v. *Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. Rep. 321.

Bollen v. *Nebraska*, 176 U. S. 87, 20 Sup. Ct. Rep. 287.

Brown v. *State*, 175 U. S. 174, 20 Sup. Ct. Rep. 77.

However, the Fourteenth Amendment guarantees the same protection as to state courts as the Fifth Amendment does as to federal courts, so that we will take the matter up from that standpoint. We mention this because the decisions by this and other courts that are in point construe the Fourteenth Amendment instead of the Fifth.

Homestead is analogous to dower and is a benefit or privilege conferred by statute. The inchoate interest or expectancy of a wife arising out of a homestead statute

is given by virtue of the marital relationship, and is exactly akin to the inchoate interest or expectancy of dower.

In *Ferry* v. *Spokane, P. & N. Ry. Co.,* 258 U. S. 314, 42 Sup. Ct. Rep. 358, this court held:

> "The right of dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of Const. Art. 4, Sec. 2, nor is the power of the states to regulate it denied by Amendment 14, but at most it is a right attached to the marital relation, subject to regulation by each state as respects property."

In the opinion, written by Mr. Justice McKenna, it is said:

> "Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits. *Conner* v. *Elliot,* 18 How. 591, 15 L. Ed. 497. Neither section 2 or article 4 nor the Fourteenth Amendment takes from the several states the power to regulate this subject; nor does either make it a privilege or immunity of citizenship. *Maxwell* v. *Bugbee,* 250 U. S. 525, 537, 538, 40 Sup. Ct. 2, 63 L. Ed. 1124, and cases cited; *United States* v. *Wheeler,* 254 U. S. 281, 296, 41 Sup. Ct. 133, 65 L. Ed. 270.
>
> "The further contention, based on the Fourteenth Amendment, necessarily is, as counsel urged, that dower is 'fundamental and substantial'—a property right, being, while inchoate, a chose in action, of which no citizen of the United States wherever he (she) may be resident can be deprived without 'due process of law,' and as to which every person is entitled to the 'equal protection of the laws' as provided in the Fourteenth Amendment of the constitution.

"The Circuit Court of Appeals (268 Fed. 117) considered this contention, and it is difficult to add anything to its opinion. It is pointed out that the Oregon statute was taken from the laws of Michigan adopted in 1846 and sustained. The example of Michigan was followed in Wisconsin, Kansas and Nebraska, and sustained by the courts of those states. To the decisions of those courts we may add *Thornburn* v. *Doscher,* (U. S. Circuit Court for Oregon) 32 Fed. 810, which sustained the Oregon statute, as did the Supreme Court of Oregon in *Cunningham* v. *Friendly,* 70 Ore. 222, 139 Pac. 928, 140 Pac. 989. And we may add also *Richards* v. *Bellingham Bay Land Co.,* 54 Fed. 209, 4 C. C. A. 290, which decided to be legal a like statute of the state of Washington. And Blackstone speaks of dower as having become 'a great clog to alienation' and 'otherwise inconvenient to families.' 1 Washburn on Real Property (5th Ed.) 278, in note.

"The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification. It satisfies, therefore, the constitutional requirement of the equal protection of the laws; and we proceed to the inquiry whether the statute is otherwise valid.

"Appellant's contention is that though she be living in New York, it is her privilege under the Fourteenth Amendment to resist the law of Oregon as a limitation of her dower rights, that is, a limitation of rights in property situated in Oregon. The contention might be tenable if the legislature of a state was required to grant dower rights. As repellent of that proposition, the difference the laws of the states exhibit in the rights that attach to the marriage relation may be adduced. The states greatly differ as to what lands

are dowable, and as to what claims are paramount to dower, and to some extent, how it will be barred. 4 Kent 35 *et seq.*

"The granting of dower, therefore, is a matter of statutory regulation. It was so decided by the United States Circuit Court of Oregon in 1887 (*Thornburn* v. *Doscher, supra*), Judge Deady expressing it as follows:

"'It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether; or it may for the security of titles, and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man.'"

There is not much that can be added to the foregoing opinion by this court. As stated therein: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them." The alien law of Nebraska of 1889, and the re-enactment of the alien law in more sweeping terms in 1921, operated to prevent petitioner Marie Tollefsen Todok from holding an expectancy or interest under the Nebraska homestead statute. The fact that the Nebraska Supreme Court found it necessary to deal with her claim to homestead benefit purely from the standpoint of the treaty is a sufficient declaration by that court that she had no right under the Nebraska homestead statute independent of the treaty. The same legislative policy that the court in the Ferry case comments on as adopted by Nebraska as a protection

against absent and probably unknown wives with respect to dower is applicable to homestead.

Let us see what the Nebraska Supreme Court has said with reference to the constitutionality of this legislative policy. In *Miner* v. *Morgan*, 83 Neb. 400, 119 N. W. 781, it is said:

> "One provision on which defendant's argument is based appears in both the state and federal constitutions and declares that no person shall be deprived of property without due process of law, and another is Section 25, Article 1 of the state constitution, which provides that 'No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.' In other states similar legislation has been upheld, when thus attacked. It rests on the inherent power of the state government over the marriage relation, the means by which land within the state may be transferred by husband or wife, the interest each shall have in the property of the other, the descent or testamentary disposition of both realty and the protection of titles. In both Kansas and Wisconsin a statute like our own was sustained. *Buffington* v. *Grosvenor*, 46 Kans. 730, 27 Pac. 137, 13 L. R. A. 282; *Bennett* v. *Harms*, 51 Wis. 251, 8 N. W. 222. In discussing a statute like the one under consideration, the Circuit Court of the United States for the District of Oregon said: 'It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether, or it may, for the security of titles and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence and ostensibly as a single man.' *Thornburn* v. *Doscher*, (C. C. A.) 32 Fed. 812.

"The statute does not violate the constitutional provisions upon which defendant relies, and the construction adopted in *Atkins* v. *Atkins*, 18 Neb. 475, 25 N. W. 724, is followed."

In *Buffington* v. *Grosvenor*, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282, where a similar legislative policy was sustained against attack on the ground of unconstitutionality, it is said:

"For reasons that were deemed sufficient, the legislature made the signature and conveyance of the non-resident wife unnecessary. The fact that the wife did not accompany her husband to Kansas or had abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The statute was enacted shortly after the admission of the state, and when it was rapidly increasing in population, through immigration from many of the eastern states, and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception in the transfer of real property. The 'immunities' and 'privileges' referred to in the federal constitution would not, in any event, include the claim made by the plaintiff."

Michigan, Kansas, Wisconsin and Nebraska, as pointed out by this court in the Ferry case, supra, all have statutes permitting one spouse to convey real estate alone where the other spouse is a non-resident of the state. All of these four states have homestead statutes. Construing the statutes together, these states have uniformly held that where the wife is a non-resident, a conveyance by the husband alone of property falling within the

statutory definition of the husband's homestead is valid.

Stanton v. *Hitchcock*, 64 Mich. 730, 31 N. W. 386.

Standard v. *Jewell*, 206 Mich. 169, 172 N. W. 407.

Jenkins v. *Henry*, 52 Kan. 608, 35 Pac. 216.

Ekegren v. *Marcotte*, 159 Wis. 520, 150 N. W. 969.

Cunningham v. *Marshall*, 94 Neb. 302, 143 N. W. 197.

The only questions before this court of federal jurisdiction are whether an inchoate interest or expectancy arising out of the Nebraska homestead statute by virtue of the marital relationship are protected to a non-resident alien wife so as to prevent transfer without her signature by her husband by (1) the treaty with Norway or (2) the due process and equal protection of the law's clauses of the federal constitution. We submit that the legislature of Nebraska has the right to deny on account of non-residence any such inchoate interest in the wife, and that its right to do so is not abridged by either the treaty or the federal constitution.

The judgment of the Supreme Court of Nebraska is clearly right and should be affirmed.

Respectfully submitted,

B. F. BUTLER,
WALTER D. JAMES,
of Cambridge, Nebraska,
EARL M. CLINE,
FRANK D. WILLIAMS,
of Lincoln, Nebraska.

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